



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Telecommunications and**  
**Information Administration**  
Washington, D.C. 20230

November 4, 2009

Ms. Marybeth Peters  
Register of Copyrights  
Library of Congress  
James Madison Memorial Building  
Washington, DC 20540-3120

Re: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, RM 2008-8

Dear Ms. Peters:

The National Telecommunications and Information Administration (NTIA), an agency of the U.S. Department of Commerce, submits this letter to you to continue the consultative process that NTIA has undertaken with you and your staff in connection with Section 1201(a)(1) of the Digital Millennium Copyright Act (DMCA). NTIA is the President's principal advisor on telecommunications and Internet policies pertaining to the Nation's economic and technological advancement.<sup>1</sup> NTIA promotes "the benefits of technological development in the United States for all users of telecommunications and information facilities."<sup>2</sup>

Pursuant to the DMCA, our input to you reflects our core mission to advance the President's goal of promoting ubiquitous, open, state-of-the-art, and affordable broadband Internet access. Facilitating the creation of innovative online content and services is vital to achieve this goal. While the flexibility offered by copyright law is essential to encourage the introduction of new types of services, NTIA continues to support protecting copyright interests from threat of theft or piracy. Policies that balance the legitimate concerns of both users and content creators will best ensure that technological innovation and consumer freedom are promoted and illegal copying and distribution are discouraged.

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<sup>1</sup> National Telecommunications and Information Administration Organization Act, 47 U.S.C. § 902(b)(2)(D), (I) (2009).

<sup>2</sup> 47 U.S.C. § 901(c)(1).

## NTIA's Analysis of Proposed Classes

### A. Determination of Class of Works

Under the DMCA, the Librarian of Congress may exempt certain classes of works from the prohibition against circumventing a technological measure that controls access to a copyrighted work based on a recommendation from the Register of Copyrights.<sup>3</sup> NTIA supports the shift made in the 2006 rulemaking to allow class determination to include a use-based approach in appropriate circumstances.<sup>4</sup> As NTIA advocated previously, “in some circumstances, the intended use of the work or the attributes of the user are critical to a determination whether to allow circumvention of a technological access control.”<sup>5</sup> Tailoring exemptions based upon the harm to a particular use or user addresses the demonstrated harm and also “limit[s] the adverse consequences that may result from the creation of an exempted class.”<sup>6</sup> This approach strikes the appropriate balance, permitting exemptions for a portion of a class of works for a particular use or user without expansively exempting the entire class to accommodate a subset of users and uses.<sup>7</sup>

### B. Adverse Impact

In the past, NTIA has emphasized the need to examine “likely” adverse effects of noninfringing uses, essentially equating the required proof for both present and future harms.<sup>8</sup> Demonstrating the likelihood of future harm cannot be based upon mere speculation that a new access control mechanism may be used. However, the burden of proof could be satisfied by demonstrating that harm is likely to occur for particular individuals or for the public as a whole.

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<sup>3</sup>Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, codified at 17 U.S.C. §§ 1201-1205 (2009) at § 1201(a)(1).

<sup>4</sup> Final Rule, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, at 73 (2006 Final Rule). The pre-existing approach began with the statute defined class in Section 102 of the Copyright Act and could further be refined by the medium upon which the work appeared, such as an audiovisual works on a DVD. Based upon the recommendation from the Register in 2006, the Librarian concluded that it is also permissible, in certain circumstances, “to refine the description of a class of works by reference to the type of user who may take advantage of the exemption or by reference to the type of use of the work that may be made pursuant to the exemption.” *Id.*

<sup>5</sup> Letter from Nancy J. Victory, Assistant Secretary, NTIA, to Marybeth Peters, Register of Copyrights (Aug. 11, 2003) at 5 (Letter from Asst. Secretary Victory). *See also* 47 U.S.C. § 1201(a)(1)(B-D). These sections speak also of uses and users when mentioning the term “class of works.” *See infra* note 8. The legislative history notes that particular groups of individuals, such as “researchers, authors, critics, scholars, teachers, students, and consumers” were most likely to be adversely affected by the anti-circumvention provisions. *See* H.R. Rep. No. 105-551, pt. 2, at 26 (1998).

<sup>6</sup> 2006 Final Rule at 73.

<sup>7</sup> *See e.g.*, Joint Comments of Association of American Publishers, et al. (Feb. 2, 2009) at 7-8 (Joint Commenters).

<sup>8</sup> In conducting this rulemaking the Librarian “shall make the determination of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . [against circumvention] in their ability to make noninfringing uses . . . of a particular class of copyrighted works. In conducting such rulemaking the Librarian shall examine-- (i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate.” 47 U.S.C. § 1201(a)(1)(C). *See also* Letter from Asst. Secretary Victory at 2-5.

In either case, any resulting exemption must be specifically tailored to meet the need or mitigate against the adverse impact.

Important to the overall harm analysis is the availability of alternative means to make use of the work without circumventing access controls.<sup>9</sup> For any exemption granted, where the rights holders believe they are or may be harmed, NTIA hopes that market forces will compel solutions that will benefit not only the rights holders (who must be able to monetarily benefit from their creativity), but also consumers who will be able to make full noninfringing use of the works available.

### *C. Examination of Certain Classes*

NTIA has examined several of the proposed exemptions, grouping or combining exemptions where it will assist in the analysis and discussion. In many cases, the proponents of the exemptions have proven fair use or noninfringing use.<sup>10</sup> However, they often fail to provide persuasive record evidence to show that circumventing access control mechanisms to facilitate that lawful use is necessary to prevent harm. Essential in this analysis is the existence of reasonable alternative means to gain access to the work to facilitate the lawful use. NTIA believes the following proposed classes merit consideration.

#### *1. Class 4 (A-H) (DVD for educational purposes)*

The current exemption is limited to professors of college-level film and media studies programs. Proponents of the expansion of this exemption seek, at a minimum, a continuation of the existing exemption granted in 2006. Some proponents also seek to expand this exemption to permit use by instructors from elementary school through university level.<sup>11</sup> Some propose to extend the exemption to all subjects, not just film and media studies.<sup>12</sup> Some propose to extend the exemption to all university level students.<sup>13</sup> Opponents do not oppose continuation of the current exemption.<sup>14</sup> Moreover, opponents acknowledge that using compilations of clips of audiovisual works in the classroom as part of instruction qualifies as fair use.<sup>15</sup> NTIA concurs.<sup>16</sup>

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<sup>9</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 73 Fed. Reg. 58,073 (Oct. 6, 2008) at 76.

<sup>10</sup> *Id.*

<sup>11</sup> *See, e.g.*, Gary Handman, Director of Media Resource Center, Moffitt Library, University of California, Berkeley, Proposal at 1. One of the original proposals sought to expand this exemption to include film students. *See* Comments of Professor Peter Decherney, et al. at 1. Testimony at the hearings discussed the need for students extensively. *See, e.g.*, Testimony of Professor Peter Decherney (May 6, 2009) at 111.

<sup>12</sup> *Id.*

<sup>13</sup> Arguments to extend the exemption to cover all students did not occur until the filing of reply comments and hearing testimony. Still, there is little evidence on the record, other than argument, to support the notion that this exemption should be expanded to students and teachers in secondary and elementary level schools. *See infra* note 21.

<sup>14</sup> The opponents largely do not oppose the exemption as it currently exists. *See, e.g.*, Comments of Time Warner, Inc. (Feb. 2, 2009) at 9. In fact, the record reflects that it is being used by film and media professors. *See* Testimony of Prof. Decherney at 111. Mr. Decherney testified that surveys of media instructors conducted in 2007 established that 62 percent used clips for their classroom instruction, demonstrating the benefit of the current exemption.

<sup>15</sup> *See, e.g.*, Testimony of Mr. Fritz Attaway, Motion Picture Association of America (MPAA) (May 6, 2009) at 203-204.

The primary questions raised by these proposals is whether an expansion to all instructors and students is warranted and if so, whether a narrowly tailored exemption can be crafted to meet the educational needs while minimizing the possible adverse effects. NTIA supports expanding the current exemption for film and media studies college and university professors to include all college or university level instructors and students.

Proponents argue that education is adversely affected by access controls on DVDs.<sup>17</sup> Given the multimedia nature of today's cultural expression, classroom use of clips from content contained on DVDs is necessary to aid instruction across a wide range of topics. The record shows that this is important for both students and instructors at the university level.<sup>18</sup> Potential uses of the clips include both instructor presentations and student projects.<sup>19</sup> Indeed, proponents persuasively demonstrate that while film and media studies professors have an obvious need to use clips in their instruction, other subject matter instructors at the university level also have a need to use clips to supplement effective instruction.<sup>20</sup> However, there is not a correspondingly strong case on the record for extending the exemption to students and teachers in the K-12 setting. Administrators, institutions, teachers and students from elementary and secondary schools or their representatives did not provide sufficient evidence of harm or need in this proceeding.<sup>21</sup> Without such proof, the Register should not consider recommending expansion of this exemption beyond the college or university level.

Opponents argue that expanding the exemption to include both students and instructors at the university level would negate the usefulness of the access control mechanisms on DVDs.<sup>22</sup> NTIA is not persuaded that this will be the case. To date, the opponents have not provided

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<sup>16</sup> NTIA cautions that not all uses by instructors and students will qualify for fair use or noninfringing use. It must fit within fair use such as for instruction, research, comment, scholarship, etc. 47 U.S.C. § 1201(a)(1)(C).

<sup>17</sup> Comment of Denis Doyon, Director of Media Production, New Mexico Media Literacy Project (Feb. 2, 2009) at 3 (stating under the current exemption students are not permitted to use the resources of the media literacy project, which limits learning and instruction).

<sup>18</sup> See, e.g., Comments of Andy Cao at 1. Cao is a student the University of Pennsylvania who received an assignment to recreate a trailer using clips from the film Titanic and changing the plot of the movie. Comments of Joan Gallagher at 1. Gallagher, a high school chemistry teacher, argues that "years ago, my students would include video clips from everyday movies or television shows. . . . They can no longer do this. When they could, it was particularly helpful in our organic chemistry." *Id.* See also Comments of Prof. Decherney at 2-3. It was demonstrated that clips from DVDs have been used to help fill the pedagogical needs in the classroom for various subjects and to assist in proctoring exams for individuals that have special needs such as learning disabilities.

<sup>19</sup> See, e.g., Comments of Frank W. Baker, Education Consultant, Media Literacy Clearinghouse, Inc. (Jan. 31, 2009) at 1. Baker argues that "most state's teaching standards include having students understand 'techniques of persuasion' and showing teachers (and students) actual television commercials is a great way not only to gain their attention, but also help them understand techniques." *Id.*

<sup>20</sup> See, e.g., Reply Comments of Prof. Decherney at 9. See also Comments of National Public Radio at 1-2. National Public Radio (NPR) argues that students as well as teachers require media literacy skills and education in the "rapidly developing digital age." They argue that exemption 4C and 4D would allow NPR to further support media literacy, remove barriers for teachers and students and enable students of media literacy to fully engage in the study. It is important to note that NPR is also a copyright holder. *Id.*

<sup>21</sup> Instead most evidence presented is provided by individuals and entities at the university level or those that are involved in media literacy campaigns, but do not represent school districts, teachers associations, etc. Only one teacher from the high school level provided comments. Comments of Joan Gallagher at 1.

<sup>22</sup> See, e.g., Testimony of Bruce Turnball, Weil Gotshal and Manges, LLP, Representing DVD Control Copy Association (May 6, 2009) at 216-217. Turnball focused on the expansion to include students, expressing this as the content providers' larger concern.

evidence that the current exemption has encouraged abuse or would likely do so in the future.<sup>23</sup> In fact, NTIA is more persuaded by the argument that showing clips of works in class to demonstrate points of history, sociology, language, government, or science may encourage further exploration of the entire work by the students on their own time.<sup>24</sup> NTIA is also encouraged by the notion that classroom instruction and learning will be improved through the creative use of media.<sup>25</sup>

Opponents also argue that broadening this exemption is unnecessary since there are reasonable alternatives available, such as videotaping clips using a video camera, online movie services, and clip services. The proponents argue that each of these alternatives is unsatisfactory for the instructors' pedagogical purposes as well as for the students.<sup>26</sup> NTIA is not convinced that these proposed alternatives are sufficient for instruction and learning at the university level. For example, videotaping, as demonstrated by the opponents, costs significant money and resources and is not practical.<sup>27</sup> Proponents argue persuasively that cost and quality are significant impediments to socially and educationally valuable, noninfringing uses. Furthermore, although opponents discussed various clips services that are being contemplated or designed, these cannot qualify as viable alternatives today.<sup>28</sup>

NTIA concurs with the opponents that this exemption should be narrowly tailored largely using the language from the existing exemption.<sup>29</sup> The current exemption reads as follows: "Audiovisual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors."<sup>30</sup> NTIA is also persuaded that expanding the exemption to cover uses other than

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<sup>23</sup> See, e.g., Comments of MPAA (Feb. 2, 2009) at 11.

<sup>24</sup> See, e.g., Testimony of Abigail De Kosnik, University of California, Berkley (May 1, 2009) at 35. The record is rich with examples of instructors of various subjects that could and do use media clips. See, e.g., Comments of the Library Copyright Alliance and the Music Library Association on Proposed Exemptions (Feb. 2, 2009).

<sup>25</sup> See, e.g., Comments of National Public Radio at 1-2.

<sup>26</sup> Concerns were primarily related to the level of quality for the particular subject being taught or point being made. See, e.g., Testimony of Jonathon Band, American Library Association and Association of Research Libraries (May 6, 2009) at 229-231. See also Comments of Peter Jaszi on behalf of Renee Hobbs, Additional Comments on Screen Capture and Educational Issues (July 10, 2009) arguing, for example, that "a student who is creating [a] presentation that demonstrates how stereotypes are found in television crime programs will be hampered in using comparison-contrast techniques to examine differences in police-procedural shows on television ...."

<sup>27</sup> Proponents argue that it would be more than a mere inconvenience to be required to use these alternatives. For example, if the instructor only uses clips infrequently, obtaining expensive equipment may be burdensome. See also Testimony of Dan Seymour, MPAA (May 6, 2009) at 209. He testified that the high definition camera used for the MPAA's demonstration cost about \$900 and the flat screen TV cost about \$300.

<sup>28</sup> See, e.g., Comments of Time Warner, Inc. (Feb. 2, 2009) at 9. Time Warner discusses a *proposed* free clip service for educational purposes that it is working on with the University of Southern California, School of Cinematic Arts. Time Warner stated that the system will likely be deployed this year (2009), but deployment has not been announced to date. Until this system is deployed, not recommending the exemption on this basis will leave the educators and students unserved. NTIA applauds Time Warner and the other content providers for proposing such ideas and encourages their quick deployment. See also Testimony of Sandra Aisters, Warner Brothers (May 6, 2009) at 218-220. Aisters testified that this project would only be available to film professors that register for the program.

<sup>29</sup> NTIA concurs with the Joint Commenters that the exemption should not be expanded beyond audiovisual works in the DVD format. A need was not demonstrated on the record for other works such as videogames or compact discs. Comments of Joint Commenters (Feb. 2, 2009) at 34-35.

<sup>30</sup> 2006 Final Rule at 73-74.

creating clip compilations of audiovisual works for classroom instruction and student projects at the university level could unintentionally include uses other than for education or scholarship and encourage abuse.<sup>31</sup> NTIA agrees that the expansion of the exemption to all DVDs available, rather than just those contained in the institution's libraries and departments, is not supported by the record.<sup>32</sup> The current exemption strikes the right balance as it limits the use to DVDs from institutional libraries or media studies departments.<sup>33</sup> Permitting university institutions to make clips available for instructor and student use in the classroom or in school library facilities will limit misuse of this exemption.<sup>34</sup> In endorsing this limitation, NTIA is encouraged that there is no evidence of abuse of the current exemption. Furthermore, NTIA believes the limitations suggested here will not hinder the pedagogical needs of both university and college level instructors and students.

Finally, NTIA urges the Register to encourage those institutions that will benefit from these exemptions to put in place a comprehensive education campaign that makes all users aware of their rights and responsibilities to avoid abusing this exemption.<sup>35</sup> Best practices exist and should be utilized as part of the instruction.<sup>36</sup> NTIA also hopes that the market will be encouraged to develop and deploy alternatives, such as the clip service, that fulfill the needs expressed by the educational community and that will obviate the need for this exemption in three years.

## 2. *Class 11A (DVD for noncommercial uses)*

NTIA generally supports this proposed exemption, which would permit a circumvention of access controls for "audiovisual works released on DVD where the circumvention is undertaken solely for the purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright."<sup>37</sup> This proposed exemption would include remix videos created by individuals such as "vidders," usually hobbyists creating transformative-type works from home.<sup>38</sup> Since the last DMCA rulemaking, the world of online video has grown significantly, creating new norms and expectations that did not exist in 2006 and is becoming a new form of communication used worldwide. NTIA views this proposed exemption as an important opportunity for education, social comment and criticism, and further innovation.

Proponents argue that DMCA anti-circumvention provisions tip the balance against remix video creators, creating a barrier to fair use of the copyrighted works.<sup>39</sup> NTIA concurs that the

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<sup>31</sup> *Id.*

<sup>32</sup> *See, e.g.*, Reply Comments of the DVD Copy Control Association, Inc. (Feb. 2, 2009) at 17. Essentially, the use of copies of DVDs should be made available through the educational institution.

<sup>33</sup> By expanding this exemption to include all subjects at the university level, this language must necessarily be broadened to include all departments and libraries at the educational institution.

<sup>34</sup> 2006 Final Rule at 74. NTIA is aware that this language may limit certain media literacy campaign entities that are not a part of an educational institution and that produce materials for educational purposes using multimedia clip compilations. NTIA is persuaded that these entities serve an important educational purpose, among others; however, NTIA is not convinced that these entities must circumvent access controls to meet their needs.

<sup>35</sup> *See, e.g.*, Comments of Frank W. Baker, Education Consultant, Media Literacy Clearinghouse, Inc. (Jan. 31, 2009) at 1 (arguing that teachers need clear direction regarding their intended use of motion picture excerpts).

<sup>36</sup> *See, e.g.*, Testimony of Professor Hobbs (May 6, 2009) at 262–265.

<sup>37</sup> Comments of the Electronic Frontier Foundation (EFF) at 13.

<sup>38</sup> *Id.* at 13-16.

<sup>39</sup> *Id.*

DMCA should not stifle innovation in this area. However, NTIA is not convinced that all potential uses under this proposal are clearly noninfringing uses.<sup>40</sup> Some remix videos contain criticism and comment, are noncommercial, and use limited clips (often only seconds in duration) which qualify as a noninfringing use. However, as the proponents acknowledge, thousands of video remixes are posted online daily and not all qualify as noninfringing.<sup>41</sup> This proceeding should not be used to legitimize existing actions that may be in violation of the law.<sup>42</sup> As such, NTIA would suggest, to the extent the Register considers recommending this exemption, that a narrowing of the language is appropriate to better ensure that all uses are noninfringing. In this vein, NTIA would support language requiring that the clips from the audiovisual work must be for remix videos that are used for social comment or criticism, or that are used in transformative-type works according to established fair use principles.<sup>43</sup>

### 3. *Class 11B (DVD for documentary filmmakers)*

NTIA supports a limited use exemption for documentary filmmakers. The proponents propose that documentary filmmakers be permitted to circumvent access controls on motion pictures and other audiovisual works in the form of DVDs used in a specific documentary film.<sup>44</sup> Proponents argue that a high level of quality is necessary for all clips used in documentaries if the film is to be accepted for broadcast or other distribution.<sup>45</sup> The opponents argue, however, that adequate alternatives are available to documentary filmmakers such as licensing clips from the copyright holder.<sup>46</sup> NTIA concurs that documentary filmmakers are more likely to be sophisticated enough to license the clips used to ensure their compliance with the law. However, NTIA is also persuaded that license requests may be denied to documentary filmmakers, in certain cases, such as when the clip will be used to criticize the original work.<sup>47</sup> NTIA is concerned that this latter group may be unnecessarily foreclosed from a noninfringing use if this exemption is not granted.<sup>48</sup>

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<sup>40</sup> See, e.g., Joint Commenters at 65-66.

<sup>41</sup> See EFF at 14-15, 18-20, 24. NTIA is not persuaded that the DMCA is necessarily creating a barrier to creativity and noninfringing use of audiovisual works.

<sup>42</sup> See, e.g., Joint Commenters at 67. See also *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294, 322 (S.D.N.Y. 2000) (“If Congress had meant the fair use defense to apply to [1201] actions, it would have said so. Indeed, as the legislative history demonstrates, the decision not to make fair use a defense to a claim under Section 1201(a) was quite deliberate.”). As noted earlier, whether the use is a noninfringing use is only one factor to be consider in this proceeding.

<sup>43</sup> NTIA acknowledges that it may be difficult to craft an exemption under this rulemaking that requires legally unsophisticated users to determine what is permitted under the fair use doctrine. If this exemption is granted, NTIA encourages video remix creators to utilize existing best practice guides.

<sup>44</sup> Comments of Kartemquin Educational Films, Inc. and the International Documentary Association at 1.

<sup>45</sup> See, e.g., Testimony of Quinn, Kartemquin Educational Films (May 7, 2009) at 15.

<sup>46</sup> The opponents also argue that videotaping segments should be adequate for these users. See, e.g., Joint Commenters at 69. NTIA is persuaded that the quality needs exceed those available from videotaping clips in this case.

<sup>47</sup> See, e.g., Testimony of Quinn, Kartemquin Educational Films (May 7, 2009) at 17-18.

<sup>48</sup> Subsequent to the hearings, the Copyright Office asked whether the language proposed for this exemption could be narrowed or clarified. NTIA concurs that the proposed language is unclear and requires revision. At the very least, the category of user must be defined as documentary filmmakers. This should also include a clear definition of the term “documentary film.” Further, it seems to create an unnecessary barrier to require further membership in a certain association in order to use the exemption. Additionally, language such as “circumvention that is accomplished for the sole purpose of including portions of the work in a documentary film” should also be included.

#### 4. Class 5 (B-D) (Cell Phone Unlocking)

These proposed exemptions raise important issues at the intersection of competition, communications, and copyright law. The Federal Communications Commission (FCC) and other federal agencies are currently reviewing the issues related to competition and communications law and policy that may be linked to this proposal.<sup>49</sup> NTIA believes the triennial DMCA exemption rulemaking is an inappropriate forum to debate the larger policy issues. Yet, NTIA is persuaded by proponent's assertion that without the exemption a complete solution to the issue is not possible.<sup>50</sup>

NTIA supports continuing the current exemption; however, it does not support any of the proposed expansions of the current exemption. The current exemption reads as follows: “[c]omputer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communications network.”<sup>51</sup> The proponents seek both a continuation of the current exemption and an expansion of this language to include, for example, commercial applications of the exemption.<sup>52</sup> The opponents oppose both.<sup>53</sup> NTIA notes that in the 2006 proceeding, the opponents filed late comments that the Librarian did not take into consideration when issuing the current exemption.<sup>54</sup> In this proceeding, as in 2006, many of the comments filed support the continuation of the exemption.<sup>55</sup> Several of these commenters are individual users that have switched or desire to switch networks.<sup>56</sup> In the previous proceeding, the Librarian concluded that “the software locks are access controls that adversely affect consumers to make noninfringing use of the software on their cell phones.”<sup>57</sup> This rationale remains sound.

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See Joint Commenters, Questions Related to Documentary Filmmakers and Noncommercial Use Panels (July 10, 2009) at 2.

<sup>49</sup> See, e.g., Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361 (Feb. 20, 2007). See also Adam Clay, *Unlocking the Wireless Safe: Opening Up the Wireless World for Consumers*, 61 FED. COM. L. J. 715, 720-727 (June 2009).

<sup>50</sup> See, e.g., Electronic Frontier Foundation, In re: June 22, 2009 Questions (July 13, 2009) at 1-2. See also Mark Defeo, *Unlocking the iPhone: How Antitrust Law Can Save Consumers from the Inadequacies of Copyright Law*, 49 B.C.L. REV. 1037 (2008).

<sup>51</sup> 2006 Final Rule at 76.

<sup>52</sup> The Copyright Office received separate proposed classes from MetroPCS Communications, Pocket Communications, and the combined filing of The Wireless Alliance, Inc., ReCellular, Flipswap, Inc. and the Electronic Frontier Foundation. NTIA notes that several of these parties have a commercial interest in the continuation of this exemption.

<sup>53</sup> See, e.g., Comments of CTIA – The Wireless Association at 1.

<sup>54</sup> 2006 Final Rule at 76.

<sup>55</sup> The Register noted that there was very little opposition in the 2006 proceeding. No party came forward to represent the interests of the copyright holders until very late in the process. See Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Nov. 17, 2006) at 42 (2006 Register Recommendation).

<sup>56</sup> See, e.g., Comments of Jonathan Flerchinger at 1. He noted that because of his wife's disability, he needed a particular kind of phone which he purchased a full price from one provider. He then unlocked the phone and took it to another service provider that had an unlimited text plan.

<sup>57</sup> 2006 Final Rule at 76. The Register found that an analysis of the four factors were neutral because the software lock was not intended to protect interests in a copyright, but was a business decision to prevent switching networks. See also 2006 Register's Recommendation at 50-51. In its recommendation to grant an exemption on technological control measures on wireless communications handsets, the Register nonetheless found that, “there does not appear

NTIA is also persuaded by opponents' argument that the narrowly tailored language used in 2006 prevents unlawful use by those that would misuse the exemption for commercial purposes.<sup>58</sup> The underlying purpose of this exemption is to permit consumers adversely affected by the access control to unlock their phone and switch networks.<sup>59</sup> NTIA's endorsement of continuing this exemption should not be construed as support for commercial application of this exemption. Instead, NTIA supports the opportunity for consumers to switch networks once contractual obligations are met with current providers or where the consumer has purchased the phone outright.<sup>60</sup>

#### 5. *Class 5 (A)* (Cell Phone Jailbreaking)

NTIA does not support this proposed exemption. The principal argument in favor of the jailbreaking exemption relies on public policy considerations in the areas of communications regulation, competition law, and consumer protection law.<sup>61</sup> Proponents argue that jailbreaking will support open communications platforms and the rights of consumers to take maximum advantage of wireless networks and associated hardware and software.<sup>62</sup> Even if permitting cell phone "jailbreaking" could facilitate innovation, better serve consumers, and encourage the market to utilize open platforms, it might just as likely deter innovation by not allowing the developer to recoup its development costs and to be rewarded for its innovation.<sup>63</sup> NTIA shares proponents' enthusiasm for open platforms, but is concerned that the proper forum for consideration of these public policy questions lies before the expert regulatory agencies, the U.S.

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to be any concern about protecting access to the copyrighted work itself. The purpose of the software lock appears to be limited to restricting the owner's use of the mobile handset to support a business model, rather than to protect access to a copyrighted work itself." *Id.*

<sup>58</sup> See, e.g., Comments of CTIA – The Wireless Association at 8. Current caselaw concurs on this point. See, e.g., *TracFone Wireless, Inc. v. Dixon*, 475 F. Supp. 2d 1236 (M.D. Fla. 2007). In this case, the court held that the "exemption does not absolve the Defendants of liability for their violations of the DMCA . . ." for unlocking the phones purchased in bulk from retailers to be resold. These actions do not comply with the narrowly tailored language of the exemption which is for the "sole purpose of lawfully connecting to a wireless telephone communications network." *Id.* at 1238 (emphasis added). This reasoning was followed in a subsequent case on a similar set of facts raised by the same plaintiff. See *TracFone Wireless, Inc. v. GSM Group, Inc.*, 555 F. Supp. 2d 1331 (S.D. Fla. 2008).

<sup>59</sup> Adhering to this principle more closely aligns the process to the purpose for which DMCA was enacted. See Comments of CTIA – The Wireless Association at 5-9.

<sup>60</sup> Service providers threatened that subsidies for phones purchased may be discontinued if the exemption is continued. NTIA is not persuaded that this will occur as it has not in the previous three years. In fact, the market benefitted from the exemption. Within one month after the 2006 exemption, several of the major carriers announced that each would unlock their phones to be used on other networks. See, e.g., *A Cellular Sea Change*, N.Y. TIMES, Dec. 1, 2007 at A 14; Leslie Cauley, *AT&T Cell phone Network Wide Open*, USA TODAY, Dec. 5, 2007, at 7A; Carolyn Y. Johnson, *Big Wireless Carriers Get Set to Free the Phone*, BOSTON GLOBE, Mar. 28, 2008 at A1. Notably, popular smartphones have been introduced since the 2006 exemption that are inconsistent with these public commitments. See Cauley at 7A. To the extent this exemption encourages increased opening of the networks to benefit the consumers, NTIA supports its continuation.

<sup>61</sup> See, e.g., Comments of the Ad Hoc Public Interest Spectrum Coalition. See also Clay at 727-729.

<sup>62</sup> See, e.g., Comments of the Electronic Frontier Foundation (Dec. 2, 2008) at 5; Reply Comments of the Ad Hoc Public Interest Spectrum Coalition (Feb. 21, 2009); Comments of Mozilla Corporation (Jan. 24, 2009) at 2-3.

<sup>63</sup> NTIA applauds recent developments announced by the market that facilitates open platforms. Cecilia Kang, *Toward a Wider Wireless World: AT&T and Verizon to Open Cell Phone Networks*, WASH. POST, Oct. 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/06/AR2009100603691.html>.

Department of Justice and the U.S. Congress.<sup>64</sup> The Register ought only to consider recommending the proposed exemption if she concludes that the access control measure would be a bar to actions that the above bodies might take in response to policy judgments made at those agencies.<sup>65</sup>

Proponents' further argue that it is necessary to allow circumvention of the operating system and firmware protections on smartphones in order to enable device owners to execute third party software not approved by the operating system creator.<sup>66</sup> Yet, the access control on the phone does not control access to the third party software acquired by the user, as Content Scrambling System (CSS) controls access to content on DVDs. It only controls access to the platform to prevent uploading of unauthorized software. NTIA views this proposed exemption as somewhat analogous to the platform shifting proposals rejected previously by the Librarian.<sup>67</sup> As in those cases, an exemption is not warranted that will guarantee the device owner the ability to use any software on any and all platforms.<sup>68</sup> Therefore, NTIA sees no basis in DMCA for granting an exemption where the noninfringing use is unrelated to the access control being circumvented.<sup>69</sup>

Further this proposed exemption may implicate ownership rights, which could be dictated by user agreements signed when the consumer purchases the smartphone and may affect whether

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<sup>64</sup> See, e.g., Federal Communications Commission, Notice of Inquiry, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless Including Commercial Mobile Service, WT Docket No. 09-66 (Aug. 27, 2009). See also, e.g., Hearing of the Senate Committee on Commerce, Science and Transportation, The Consumer Wireless Experience (June 17, 2009).

<sup>65</sup> Those policy judgments must strike the appropriate balance between open platforms and encouraging investment in information ecosystems and business models that are premised on some degree of exercise of exclusive rights. See Testimony of Bruce Joseph, CTIA (May 8, 2009) at 148. See also 2006 Register's Recommendation at 51, note 148, stating that, "[n]othing in this discussion is intended to be construed as expressing approval or disapproval of any particular business models, or expressing any views on telecommunications policy." *Id.* Many legitimate and innovative business models are premised on the use of intellectual property rights. NTIA believes it is critical to enable regulators and legislators to preserve openness in the emerging broadband Internet business models and NTIA is prepared to accept that innovation can and does arise by creative use of intellectual property protection to direct the benefits of wise investment decisions. NTIA cannot characterize either absolute control by intellectual property owners, nor complete openness, as universally applicable policy goals.

<sup>66</sup> See, e.g., Testimony of Fred von Lohman, Electronic Frontier Foundation (May 1, 2009) at 322.

<sup>67</sup> See, e.g., 2006 Final Rule at 78. While NTIA understands that the third party software may be specifically written for the particular smartphone platform that still does not guarantee that the user may upload and use that software, if it requires modifying the operating system on the smartphone to permit that use. In other words, there is no fair use right that guarantees that the work can be used on a particular platform despite the proponents' assertion otherwise. See also *Krause v. Titleserv*, 402 F.3d 119, 119-121 (2d Cir. 2005), *cert denied*, 546 U.S. 1002 (2005) at 119-121; *Universal City Studios, Inc., et al. v. Corley, et al.*, 273 F.3d 429 (2d Cir. 2001)(as amended Jan. 29, 2002), stating: "[w]e know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original."

<sup>68</sup> Moreover, NTIA is not convinced that the smartphone owners are harmed by the control access as there are many thousand authorized applications available for use providing sufficient alternatives to the unauthorized ones. See, e.g., Response of Apple Inc. to Questions Submitted by the Copyright Office Concerning Exemptions 5A and 11A (Class #1) at 15.

<sup>69</sup> See Notice of Inquiry, 73 Fed. Reg. 58,073, at 74, stating, "[m]oreover, for a proposed exemption to be considered in this rulemaking, there must be a causal connection between the prohibition in 1201(a)(1) and the adverse effect on noninfringing uses."

this is a noninfringing use.<sup>70</sup> One opponent asserts that access control protects the bootloader and operating system programs from unauthorized modification, which affect the overall use of the smartphone and constitutes copyright infringement.<sup>71</sup>

## 6. Class 8 (Vulnerabilities Research)

NTIA supports an exemption that would permit research into certain or potential vulnerabilities that compromise the security of personal computers. The proponent argues for an exemption to examine games and other works accessible by personal computers.<sup>72</sup> The current exemption sought to assist in the resolution of the Sony Rootkit dilemma, which was a specific vulnerability.<sup>73</sup> While the Sony Rootkit vulnerability does not now exist, in part due to the current exemption, it seems to be a certainty that new vulnerabilities *will* emerge in the next three years.<sup>74</sup> Proponents seek the continuation of a research exemption to address these vulnerabilities.

Proponents have persuasively argued that without a research exemption, research into all current and future vulnerabilities would be chilled and is chilled now.<sup>75</sup> Proponents seek an exemption to research literary works, sound recordings, audiovisual works and games that contain a technological protection measure that may itself cause a security vulnerability

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<sup>70</sup> See Response of Apple Inc. to Questions Submitted by the Copyright Office Concerning Exemptions 5A and 11A at 1-2. Consumers that modify the firmware or other software may not only violate user agreements, but may also be subject to an infringement action without an affirmative defense. This raises the question of whether modifications to software for purposes of uploading or using third party software or applications can be a noninfringing use that would qualify as an exemption. See, e.g., *Krause v. Titleserv*, 402 F.3d 119 (2d Cir. 2005), *cert. denied*, 546 U.S. 1002 (2005). The Court in *Krause* reviewed 17 U.S.C. § 117, which provides affirmative defenses to copyright infringement for making adaptations of a computer program in one's possession. The Court outlined five factors it considered dispositive to the ownership issue. These include paying consideration for the program, customizing the software for own purposes, etc. However, it is unclear whether this case would come out in favor of proponents or opponents. The factors could be argued and have been argued both ways. To date, no court has decided this particular issue with regards to software modification on cell phones.

<sup>71</sup> See, e.g., Response of Apple Inc. to Questions Submitted by the Copyright Office Concerning Exemptions 5A and 11A at 2-4. The issue for this exemption is whether there is a noninfringing use of copyrighted smartphone operating system software or firmware that would be harmed by the failure to grant an exemption. *Id.*

<sup>72</sup> See Comment of Christopher Soghoian, Berkman Center for Internet & Society, Harvard University (Dec. 2, 2008) at 1-2. See also Comments of Computer and Communications Industry Association (CCIA) at 4. CCIA supports "an exemption for all works that threatened critical infrastructure." CCIA further states expanding the current exemption to include classes of works generally embodied in digital formats solves the problems and is "sorely needed." *Id.* at 4. See also Comments of American Intellectual Property Law Association (Feb. 2, 2009) at 2 (AIPLA opposed 8A as already contained in 1201(j)). AIPLA did not oppose 8B. Joint Commenters also opposed this exemption. See Joint Commenters at 47. No one else opposed this exemption.

<sup>73</sup> 2006 Final Rule at 77.

<sup>74</sup> See Halderman at 5. The proponent lists several vulnerabilities that have occurred in the recent past. His focus however is primarily on games.

<sup>75</sup> *Id.* at 6-8. This comports with Congressional concerns that justified the current encryption research exemption. H.R. Rep. No 105-551, pt. 2 (1998). See also Comment in Support of Proposed Exemptions 8A and 8B, Ben Adida, Research Faculty, Harvard Medical School, et al (Feb. 2009)(Comments of Research Professors). These comments were signed by 41 research professors from various universities and computer science labs. The primary point of this comment is that proposed exemptions 8A and 8B as written "will promote increased security for personal computers by facilitating computer security research" and "will mitigate the chilling effect of the . . . DMCA on independent researchers."

compromising the personal computer.<sup>76</sup> The dilemma posed here is that the proponents' arguments depend to some degree upon speculation that vulnerabilities do and will exist in the future.<sup>77</sup> However, if the Register focuses completely on the limited list provided by the proponents, the point is missed. The idea is that the exemption is warranted to provide adequate protection and incentive because, as the proponents point out with these examples, vulnerabilities *will* exist in the future.<sup>78</sup> Moreover, the exemption granted in 2006, which is based primarily upon the Sony Rootkit issue, did not limit the exemption to only allow research on the Sony Rootkit problem, but permitted research into the other similar vulnerabilities on compact discs.<sup>79</sup>

NTIA supports a limited exemption that permits research by academic, government, and private entities and individuals. Opponents' attempts to narrow this exemption to qualified or certified academic researchers are unworkable as they eliminate valuable portions of the research community.<sup>80</sup> Additionally, NTIA concurs with the Librarian's conclusion in 2006 that a research exemption may not be covered completely under the existing statutory exemptions.<sup>81</sup>

### 7. Class 1 (literary works)

NTIA supports continuation of the current exemption for e-books for the visually impaired. Proponents propose continuation of a long-standing exemption to facilitate access to literary works for the visually impaired through e-books.<sup>82</sup> Despite the limited level of information provided by the exemption's proponent, NTIA is persuaded that harm to these uses and users is likely to exist.<sup>83</sup> NTIA is encouraged that through recent marketplace innovations, partly spurred by this exemption, access to e-books for the visually impaired is greater than it

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<sup>76</sup> See Comment of J. Alex Halderman, University of Michigan (Dec. 2, 2008) at 8. In order for this proposed exemption to be functional it requires an exemption that broadens the current wording to include more than just works contained upon compact discs, as in the Sony Rootkit scenario, but should include works on various media.

<sup>77</sup> See Halderman at 6-8. See also Comments of Research Professors at 4-5. The Research Professors argue that "DRM [digital rights management] tools are likely to continue to pose serious security risks to consumers. . . . Accordingly, it seems likely that PC-based DRM technology will continue to pose security risks in the future." See also Testimony of Professor Halderman (May 7, 2009) at 182-183. Prof. Halderman noted that in 2007 Macrovision's SafeDisc affected one billion PCs, which is 2000 times as many as were affected by the Sony Rootkit issue.

<sup>78</sup> See Reply Comment of J. Alex Halderman, Assistant Professor of Electrical Engineering and Computer Science, University of Michigan. Professor Halderman provides detailed research plan of the SecuROM DRM system or similar PC game. He does not suggest that a security risk exists on the SecuROM DRM system. Instead, Prof. Halderman argues that because attackers have "discovered how to exploit problems in SafeDisc, a DRM system for PC games, to seize control of computers . . . . In light of these threats, characterizing the risks of DRM systems and understanding the causes of those risks are increasingly high priorities for security research." *Id.* at 2.

<sup>79</sup> 2006 Final Rule at 77.

<sup>80</sup> See, e.g., Joint Commenters, Re: Questions Relating to Security Flaws (July 10, 2009) at 2. NTIA understands the concern and need to narrow the language. However, NTIA notes that many qualified researchers are not necessarily academics, nor should a particular researcher have to gain a particular credential in order to qualify.

<sup>81</sup> 2006 Final Rule at 77.

<sup>82</sup> Comments of the American Federation of the Blind (AFB Proposal) at 2. The proponent argues for an exemption that allows the seeing impaired to manipulate use-level controls of e-books to repurpose the content into accessible format.

<sup>83</sup> AFB Proposal at 2-3, 6-7. The proponent examined five books as a sample of the problem. At least two of the books are in the public domain, for example, for which the DMCA would not apply. The case made here is again weak. In fact, the proponents do not present the level of evidence envisioned by the requirements established in this proceeding. See, e.g., 2006 Register's Recommendation, at 39; 2006 Final Rule at 75.

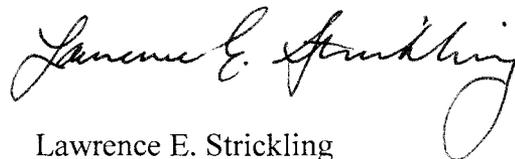
may have been three and six years ago.<sup>84</sup> Yet even a limited number of literary works without access for the visually impaired is too many.<sup>85</sup> Manufacturers and retailers of e-books should review the concerns and dilemmas advanced by the proponents and supporters of this exemption and seek to improve their products and services to provide full and equal access to all works to benefit the visually impaired.<sup>86</sup> For the next three years, NTIA supports continuation of this narrowly tailored exemption with the hope that the market will eliminate the need for this exemption altogether.<sup>87</sup>

*D. Remaining Proposed Classes*

To the extent the Register finds that the record supports the continuation of the Class 6 (dongles), NTIA supports continuation of the exemption without expansion.<sup>88</sup> NTIA further believes that the record does not support granting exemptions for: Class 2 (subscription services), Class 3 (motion pictures), Class 7 (forensic research), Class 9 A (digital conversion/broadcast flag) and B (down conversion), and Class 10 (authentication servers).

Should you have any questions regarding this discussion, please feel to call me at 202-482-1840. Thank you again for your consideration of NTIA's views on this important matter.

Sincerely,



Lawrence E. Strickling

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<sup>84</sup> See, e.g., Software & Information Industry Association Comments at 2.

<sup>85</sup> The proponent does not provide a number of works that it has estimated are unavailable.

<sup>86</sup> See AFB Proposal at 6-7.

<sup>87</sup> Finally, it is important to note that no one opposed this exemption. Only two commenters addressed this proposal and did not oppose its continuation. Joint Commenters at 22; American Intellectual Property Law Association, at 1-2. The Joint Commenters noted the lack of a strong record, but did not oppose the exemption. NTIA agrees that to the extent the proponents seek a future exemption: “[we] hope that AFB or other proponents will provide additional support for the proposal during future comments and hearings. . . .” *Id.* Despite the weak record, NTIA does not believe that now is the time to reject this exemption as this may have an uncertain effect on the progress made in the marketplace to make these works available to the visually impaired.

<sup>88</sup> Based upon the record, NTIA believes the current exemption has served the community well. Further, none of the commenters oppose extending the current exemption. Several did oppose the proposed expansion, which had been rejected in 2006. See, e.g., Software & Information Industry Association Comments at 6; Joint Commenters at 43. NTIA concurs that further expansion does not appear justified.